

Justice and legitimacy hindered by uncertainty

The legal status of traditional councils in North West Province¹

Monica de Souza*

m.desouza@uct.ac.za

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The Traditional Leadership and Governance Framework Act 2003 provides for the transformation of apartheid-era tribal authorities into constitutional-era traditional councils with a role in traditional governance. The process involves reconstituting these councils to meet certain thresholds of women and democratically elected members. Where councils have failed properly to meet the thresholds – seemingly the case in much of North West Province – their present legal status is called into question. In North West, the ambiguity surrounding their status has been compounded by the conduct of the provincial government, underlying tensions in the legislation, and a confusing series of contradictory government notices and court judgements dealing with the issue. This article examines how the reconstitution requirements have been applied in practice in North West and considers the legal and material impacts of the existing uncertainty surrounding traditional councils' status. Where these councils are put forward as democratic bodies representing traditional communities in North West's platinum mining belt, these are particularly important issues to consider in relation to the legitimacy of traditional councils.

The government has enacted legislation aimed at transforming traditional institutions that were set up or altered under colonialism and apartheid, into institutions that are compatible with constitutional values such as democracy, accountability, equality and freedom.² Traditional councils – presided over by traditional leaders and established in respect of traditional communities – constitute one part of this transformative project. In this article, the process by which the transformation of traditional councils has been attempted in North West Province is considered. It is argued that uncertainty around the legal status of untransformed traditional councils

can in part be attributed to underlying tensions in the rationale and provisions of legislation governing these councils. Finally, in the context of traditional councils representing traditional communities and being included in recent policy proposals, the article considers the broader material impact of this uncertainty, particularly on traditional communities in the North West platinum mining belt.

Transitional arrangements in the Framework Act

When it came into force in 2004, the Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003, hereafter the TLGFA) provided a framework for the hierarchical recognition and regulation of various traditional leadership institutions

* Monica de Souza is a researcher at the Centre for Law and Society, Faculty of Law, University of Cape Town.

in South Africa. The government hoped to define a role for traditional leaders 'within the new system of democratic governance' by transforming what remained of traditional leadership after colonialism and apartheid into something that could comply with the values set out in the Constitution, and with the view to 'restore the integrity and legitimacy of the institution'.³

To this end, the TLGFA includes certain 'transitional provisions' that require some traditional institutions to reconstitute themselves as pseudo-democratic bodies, while others are dissolved or conditionally given new life.⁴ The transformation of surviving tribal authorities – originally formalised in terms of the Bantu Authorities Act 1951 (Act 68 of 1951, hereafter the BAA)⁵ – is dealt with in s 28(4) of the TLGFA.

When it was first promulgated, the BAA empowered the Governor-General of the Union of South Africa⁶ to establish a 'Bantu tribal authority' over a tribe or community (or groups of these).⁷ Tribal authorities were headed by chiefs or headmen and had general administrative authority in respect of these leaders' areas of jurisdiction.⁸ This framework supported decades of forced removals and calculated traditional leadership appointments, in order to further an apartheid agenda and consolidate people into ethnic tribes.⁹

Against this tainted backdrop, s 28(4) of the TLGFA deemed all of the tribal authorities that had not expressly been disestablished by the time of the Act's commencement on 24 September 2004 to be 'traditional councils' recognised in terms of s 3 of the Act, which envisions the establishment of traditional councils for newly recognised traditional communities according to certain procedures.¹⁰

What this means is that, despite their apartheid origins, old tribal authorities were assumed to have legal recognition in democratic South Africa. However, a proviso was included: tribal authorities who were automatically recognised had to reconstitute themselves within certain timeframes.¹¹ At first, they had only one year within which to complete their reconstitution. However, in a 2009 amendment this deadline was retrospectively extended to seven years, ending on 23 September 2011.¹² North West Province formulated its own

version of these transitional arrangements – the significance of which will be returned to later.¹³

Requirements for reconstitution of traditional councils

The reconstitution requirements for traditional councils are those set out in s 3(2) of the TLGFA. The legislation envisions that traditional councils consist of a certain number of members, of which certain percentages must be women and democratically elected. Similar requirements are set out in provincial Acts, which are supposed to govern traditional leadership according to the TLGFA, but adapting, where necessary, to each province. In the following sections, North West's description of requirements for reconstitution and the actual steps taken to meet these will be discussed in conjunction with the TLGFA's requirements.

There is an evident link between traditional council reconstitution and broader dissatisfaction with the state of traditional governance within communities and governance by the North West provincial government more generally. The struggles for recognition and transformation of traditional councils in North West do not happen in isolation – they happen within a context of community poverty, mineral wealth, workers' unrest in the mining sector, and seemingly unaccountable leadership, greed and corruption.¹⁴ Under these circumstances the legitimacy of traditional councils in North West – even if properly reconstituted in terms of the procedure detailed below – becomes seriously questionable.

Elected and selected members

The first s 3(2) requirement considered here pertains to the portion of traditional council members who must be 'elected' in comparison with those who are 'selected'. The provision states that 40% of the council must consist of ordinary community members who have been democratically elected by the traditional community.¹⁵ The remaining 60% of the council must consist of members selected by the community's senior traditional leader according to custom, and can include other traditional leaders.¹⁶ The senior traditional leader is automatically also a member and the chairperson of the council.¹⁷ All members of the council serve a five-year term of

office that is supposed to coincide with the term of the National House of Traditional Leaders.¹⁸ Significantly, the apportionment between selected and elected members does not affect the gender threshold to be discussed later – whether elected or not, in total at least one-third of members must be women.¹⁹

Oddly, the North West Traditional Leadership and Governance Act 2005 (Act 2 of 2005, or the NWA) does not include a similar elected/selected split for traditional councils, nor, unlike other provinces, are there any North West regulations to prescribe procedures for holding traditional council elections.²⁰ Provincial government notices make this omission apparent by using other, only indirectly relevant, provisions in the NWA to justify the actions of government officials relating to traditional council elections. Traditional councils in North West are, however, still subject to the elected and selected member composition requirements in the TLGFA.²¹ From provincial government notices announcing the dates of traditional council elections, as well as the holding of elections in practice, it is clear that North West accepts these requirements.²² However, without provincial regulations to govern traditional council elections, the election process has been plagued by confusion and conflict.²³ The legal basis for actual procedures followed is also dubious, since no election guidelines are provided in the TLGFA.

In July 2008, the North West Premier issued a Gazette notice announcing the ‘reconstitution’ of all traditional councils in the province, to ‘substitute’ old tribal authorities that ostensibly still existed in terms of a provision in the NWA.²⁴ The significance of the precise wording of this provision will be returned to later. While the notice listed the name, surname and gender of each traditional council member in the province, it did not reveal whether they had been selected or elected, nor did it indicate whether the members were, for example, royal family members – information that would not be obvious to outsiders. Whether the selected and elected members were correctly constituted for each traditional council in the 2008 notice can therefore only be assessed upon further investigation of each individual council. There have been no traditional council membership lists for North West since, and it is therefore not clear whether

membership is properly apportioned at present. This raises a further question about whether reconstituted traditional councils can be said to legally exist at all if the names of members have not been officially gazetted in terms of s 3(3) of the TLGFA.²⁵

Nonetheless, the proper reconstitution of traditional councils depends on more than whether the prescribed elected/selected split has been complied with. Reconstitution also depends on whether elections actually took place when they were supposed to, and whether the electoral processes qualify as ‘democratic’. The evidence recounted in the following sections suggests that North West has failed in both respects.²⁶

Traditional council elections in North West

Although the 2008 notice purports to ‘reconstitute’ traditional councils in North West, there seem to be no prior Gazette notices announcing the dates and procedures to be followed for elections of the 40% component. According to one account from the province, traditional council elections did take place on 8 October 2005 but were ‘fatally flawed’.²⁷ Without any official notices concerning these elections, it is difficult to know how they were conducted or what was done with the results. Presumably these elections formed the basis for council membership as listed in the 2008 notice.

A second round of North West traditional council elections was held in the latter half of 2011, after the Premier had published how many members each council should have. This is apparent from a 2013 North West Gazette notice in which elections held on 28 September, 2 November and 12 November 2011 were annulled – almost two years later.²⁸ No information about these elections had been published in the Gazette before. The notice states that ‘credible reconstitution’ will occur at a later date in 2013 ‘under the auspices of the Independent Electoral Commission (IEC)’,²⁹ suggesting that the 2011 elections were not credible and not up to the electoral standard maintained by the IEC.³⁰ At least two traditional communities held elections – marred by ‘shortcomings’ – earlier in June 2011,³¹ but these are not mentioned in the annulment notice. There was confusion about how elections were to be conducted

on a practical level in the absence of election guidelines, and information about nomination and election dates was lacking.³² Presumably this must have hampered the ability of people to participate in the elections. Instances of women being disregarded in the electoral process were also reported.³³ Although these elections were not annulled in 2013, the results were also not officially declared,³⁴ and certainly do not seem to have been published in the North West Gazette.

However, the second round of elections did not encompass all traditional councils in North West. In September 2012 it was reported in the media that a traditional community in North West, the Bapo-ba-Mogale, was finding it difficult to hold the North West government accountable for outstanding mining revenues precisely because its traditional council had not yet been reconstituted.³⁵ According to the report, the Bapo held an *ad hoc* second traditional council election in 2009,³⁶ related to a purported disbandment of the council by the senior traditional leader,³⁷ but this was never officially recognised.³⁸ Unlike other traditional communities, elections were not held for the Bapo in 2011 and,³⁹ despite requests from sections of the community, elections had not yet been held by the time of the media report.⁴⁰

The 2011 election results remain excluded from any public official government communication. North West's next reference to traditional council elections appeared on 26 April 2013, with a press release about a Memorandum of Understanding with the IEC to hold elections for 56 traditional councils.⁴¹ These were expected to take place during July 2013 and the Bapo-ba-Mogale complaints were indirectly referenced to justify a third round of elections, only two years after the previous process:

The election process which is due to start in July, is expected to quell down tensions in the traditional councils following disputes lodged regarding lack of transparency about the running of traditional funds and developments.⁴²

Without regulations to govern the elections, the IEC was put in control of the electoral process, which had to be 'free and fair'.⁴³

After mistakenly publishing an 8 June 2013 date for elections⁴⁴ – later revoked⁴⁵ – North West announced that on 31 May the IEC would be operating door-to-door voter registration, upon presentation of a South African identity document, in three out of four districts in the province.⁴⁶ Elections were set for 6 July 2013 and an election timetable was published, scheduling the certification of a voters' roll, nomination of candidates, and finalisation of candidate lists leading up to the elections.⁴⁷

Then, one day before elections were to take place, North West announced that they were being postponed indefinitely.⁴⁸ Again, reference was made to tensions surrounding the electoral process in some traditional communities:

A number of challenges have emerged in various communities ... some of the communities did not fully participate nor support the electoral process from inception, legal challenges and incomplete candidate nomination process [sic] in some villages which resulted in stalling the ballot production process.⁴⁹

By November 2013, North West announced preparations for another attempt at traditional council elections, to be held by March 2014.⁵⁰ The IEC had been discarded as an electoral partner in favour of the Electoral Institute for Sustainable Democracy in Africa, a non-profit organisation.⁵¹ The province continued to motivate for traditional council elections as an important 'cornerstone of democracy' and a potential solution to the conflict existing in some traditional communities.⁵² Thus, a new date for elections was gazetted on 22 January 2014 – three days before elections were scheduled to take place.⁵³

After several setbacks, a third round of elections was finally held on 25 January 2014.⁵⁴ Results for the Bapo-ba-Mogale were announced in the community on 27 January.⁵⁵ However, the North West government had at the time of writing not yet gazetted the final results of these elections or the names of selected members for any traditional council.⁵⁶ Current membership of these councils is therefore unclear, and it cannot be assessed whether they have properly met the TLGFA's composition requirements.

Despite the rhetoric in press releases, North West does not seem to be treating the election of traditional council members with due seriousness.⁵⁷ One journalist noted a lack of public information about the elections and pointed out that a press release issued on the day of voter registration would never have made it into print media in time for ordinary people to become aware of the registration process.⁵⁸ Furthermore, North West's inclusion of 'legal challenges' as a reason for postponement possibly refers to litigation – sometimes against the provincial government itself – by the Bapo-ba-Mogale, relating to traditional leadership status, threats of violence and intimidation, platinum miners' strikes, fraud, maladministration and outstanding mining revenues.⁵⁹ This highlights the connection between poorly executed traditional council elections and broader contestations by traditional communities like the Bapo-ba-Mogale, implicating the North West government and thereby calling into question the province's adherence to the rule of law.

Although beyond the scope of this article, it should be noted that North West is not the only province that has experienced difficulties with the election of traditional councils. Reports from the Eastern Cape reveal that elections were opposed by civil society organisations,⁶⁰ while Limpopo has at the time of writing held no elections at all.⁶¹ In KwaZulu-Natal there was an attempt in 2012 to interdict elections from proceeding, based on allegations of incorrect procedure being followed.⁶² When elections continued nonetheless, there was negligible voter turnout in at least one area due to protest action against names being omitted from the ballot.⁶³ This is indicative of a broader failure by the government to give proper effect to the TLGFA's reconstitution requirements.

Gender component

The second reconstitution requirement – that at least one third of traditional council members must be women⁶⁴ – coincides with the TLGFA's stated goal of 'progressively' advancing 'gender equality within the institution of traditional leadership'.⁶⁵ This requirement was incorporated into the NWA without substantial change.⁶⁶ The requirement therefore seems absolute, except where provincial legislation provides a premier

with the discretion to lower a particular council's gender threshold.⁶⁷ The NWA does not provide for this. Traditional councils in the province are therefore always required to have at least one-third women members in order to be properly reconstituted.

In litigation challenging the constitutionality of the Communal Land Rights Act 2004 (Act 11 of 2004), the Director-General of the then Department of Provincial and Local Government included statistics on the gender composition of traditional councils in her answering affidavit.⁶⁸ These statistics, dated April 2007, revealed that in North West 29% of traditional council members were women, while only seven out of 54 councils exceeded the one-third women requirement.⁶⁹ From the July 2008 Gazette notice it is similarly apparent that some traditional councils managed to achieve the one-third quota, while others did not.⁷⁰ It is unclear whether traditional councils in the North West at present meet the gender requirement because, as explained above, the official membership of the councils is unknown. Once it is clear who the members of each traditional council are, compliance with the requirement can be assessed on a case-by-case basis.

Number of members

The final requirement to be considered here is that each traditional council must have a number of members as specified by the premier of the province in which the traditional council is situated.⁷¹ When determining an appropriate number of members for each council, premiers must be guided by a national formula, determined by the Minister of Cooperative Governance and Traditional Affairs.⁷²

Prior to the TLGFA's amendment in 2009, all traditional councils were permitted to have a maximum of 30 members, 'depending on the needs of the traditional community concerned'.⁷³ Some provincial Acts, including the NWA,⁷⁴ have not yet incorporated the 2009 amendment and still reflect a 30 member limit.⁷⁵ However, since the TLGFA provides the framework within which provincial legislation can deal with traditional leadership and governance, provinces arguably have to comply with the 2009 amendment, regardless of whether provincial legislation has been updated accordingly.⁷⁶

National guidelines on traditional council member numbers were published in April 2011.⁷⁷ These guidelines provide premiers with two methods for determining the number of members: either based on the number of recognised headmen in the traditional community, or on the estimated population size of that community. The guidelines further indicate how council membership should be apportioned between ordinary community members and, for example, royal family members.

The national guidelines are applied to 56 traditional communities in two North West Gazette notices in 2011 and 2013.⁷⁸ Both notices used an estimated population size to determine member numbers, and the apportionment of membership was further detailed.

Although the number requirements seem trivial, if traditional council members are not constituted exactly as prescribed, councils will have failed to reconstitute themselves properly. However, as per the gender threshold, it is unclear whether at present traditional councils in North West meet the number requirements, because recent membership of these councils has not been gazetted.

Meeting reconstitution deadlines

There are further questions about the timing of reconstitution attempts in North West. These are complicated questions, considering the TLGFA deadline's retrospective extension and that the NWA's own deadlines are different to those in the TLGFA.

When it was first promulgated, s 28(4) of the TLGFA required traditional council elections and reconstitution to take place within one year – by 23 September 2005. The first round of traditional council elections in North West took place about two weeks after that date.⁷⁹ Although this was late at the time, the lateness was ostensibly rectified by the retrospective 2009 amendment of the TLGFA as discussed above.

The NWA only came into operation on 20 March 2007.⁸⁰ This provincial Act required that old tribal authorities in the province be disestablished within one year of its commencement – by 19 March 2008.⁸¹ Although late⁸² and not in full compliance with

the disestablishment requirement,⁸³ this is ostensibly what the 15 July 2008 notice attempted to do.⁸⁴

As stated earlier, in terms of the original TLGFA a traditional council was only meant to serve a term of five years, after which new membership had to be selected and elected. The TLGFA and NWA provide two different starting points for this five-year period, further complicated by the aligning of traditional council members' terms with that of the National House of Traditional Leaders, and the retrospective correction of late or incomplete reconstitutions through the TLGFA's amendment.

The unfolding of traditional council elections in practice suggests that the province has alternately considered each of these starting points as applicable. There seems to have been much confusion about how traditional councils are meant to be formed, by when, and via which procedures – and understandably so. There have been attempts to solve the legal puzzle about the correct deadline for reconstitution in North West – most notably in litigation involving the Bapo-ba-Mogale.⁸⁵ However, these will not be assessed in detail here. Whatever the correct deadline for reconstitution, a second round of elections, assuming they were credible, only took place in January 2014 and the official gazetting of resulting reconstituted traditional councils is yet to take place. The TLGFA imposes a limitation on the duration of the transition from old tribal authorities to new traditional councils, and also sets parameters for the term of office of a particular traditional council. The present situation in North West seems to flout both of these time restrictions.

In light of ambiguity around the current apportionment of traditional council membership in respect of women and elected members, the apparent failure of traditional council election processes, and the likely lapsing of reconstitution deadlines as discussed above, what are the consequences for North West traditional councils' legal status and recognition? Has a failure to comply with the TLGFA's reconstitution requirements for traditional councils caused a lacuna in traditional governance in the province at present? The following section considers these questions.

Effect of failing to meet reconstitution requirements

Looking to the legislation

Section 28(4) of the TLGFA does not elaborate on the consequences of non-compliance with the s3(2) requirements within the specified time period.⁸⁷ The use of peremptory language in the provision makes it clear that the transformation of traditional councils is not optional. The wording 'provided that' also suggests that the automatic and immediate deeming of a particular tribal authority as a traditional council only stays put after the transitional period if there is compliance with the reconstitution requirements – thus, recognition is conditional on transformation.⁸⁸ Presumably then, not complying with the reconstitution requirements also means not being recognised as a traditional council.⁸⁹ Yet this conclusion is not obvious from the Act and may actually undermine the democratisation aim of the transitional provisions. The Act also does not specify whether unrecognised tribal authorities should then be dissolved and how that dissolution would practically proceed.⁹⁰

The NWA's manifestation of this provision treats the deeming of tribal authorities differently – although this arguably cannot be interpreted so as to conflict with the TLGFA.⁹¹ Instead of immediately deeming tribal authorities as traditional councils, provided that they meet certain requirements, the NWA states that tribal authorities will continue to exist as such until they are replaced with reconstituted traditional councils.⁹²

This may explain what happens to tribal authorities in North West that fail to be properly reconstituted – they do not cease to exist, because s 43(1) extends their lifespan until they are properly replaced.⁹³

However, the NWA then imposes a one-year deadline for the disestablishment of tribal authorities by the premier.⁹⁴ If read with s 43(1), this could mean that tribal authorities continued to exist after the NWA's commencement, but only for a maximum of one year, by which time they would have had to be substituted. It is unclear whether s 43(1) still applies if the premier fails to disestablish tribal authorities in time, as was indeed the case in North West. Moreover, it is doubtful whether the NWA could successfully

extend the lives of tribal authorities in the province if the TLGFA's provisions have resulted in their extinguishment.⁹⁵

Judges have grappled with the murky interface between the transitional provisions in the TLGFA and the NWA in litigation involving the Bapo-ba-Mogale. Their judgements have regrettably added to the murkiness, instead of providing clarity, and the conclusions drawn across cases are sometimes contradictory. Although there are several pronouncements to examine from these court battles, only some highlights from the judgements will be mentioned in the following section.⁹⁶

Have the courts provided answers?

In July 2010, Judge AA Landman in the North West High Court considered which body (and members thereof) was responsible for traditional governance in the Bapo-ba-Mogale traditional community, noting the existing 'crippling uncertainty about which institutions are in charge of the tribe's affairs'.⁹⁷

The judge concluded that, at the time of the judgement, old tribal authorities in North West no longer existed and therefore could not be disestablished (despite the provisions of the NWA) because the TLGFA's transitional provisions immediately converted them into traditional councils with the same members.⁹⁸ Furthermore, initial membership was meant to be temporary, pending a correct composition of women and elected members.⁹⁹ When, after one year, membership still had not been rectified, the traditional council continued to exist as such, but with old members.¹⁰⁰ This interpretation meant that the two Acts were in conflict,¹⁰¹ because while the TLGFA's transitional arrangements enabled old tribal authorities to perform the newly legislated functions of traditional councils, the NWA left them 'in limbo'.¹⁰² Landman finally concluded that because of the retrospective amendment of the TLGFA, traditional councils still had until 23 September 2011 to be correctly constituted.¹⁰³

Yet North West again failed to constitute traditional councils by that date, which renders Landman's judgement noteworthy but ineffectual. Furthermore, his conclusions were directly contradicted by a

judgement delivered in the North Gauteng High Court on the same day.¹⁰⁴ There, Judge MF Legodi decided that 'traditional councils' as such had never come into existence in North West, since they failed to comply with the reconstitution requirements within the original one-year deadline.¹⁰⁵ Yet, the institution itself continued to exist as a 'tribal authority' with legal standing, because of s 43(1) of the NWA that extends the lifespan of untransformed traditional authorities.¹⁰⁶

In June 2011, Judge RD Hendricks of the North West High Court dealt with an attempt to interdict an official second election process for Bapo-ba-Mogale traditional council members.¹⁰⁷ His judgement in effect acknowledged a lacuna in traditional governance for the Bapo-ba-Mogale – stating that the council members' term of office had ended by September 2010, but that no new members had yet been elected to replace them.¹⁰⁸ He concluded thus that the old members had no legal standing to interdict new elections from taking place.¹⁰⁹

Three months later Hendricks decided, to the contrary, that another North West traditional council – similarly with an expired term of office and no new elected members – did have legal standing and continued to exist, with its members remaining in office until proper reconstitution.¹¹⁰ This time the judge stated that it was impermissible to allow a governance vacuum pending a second round of elections, delayed as a result of North West's failure to clarify council jurisdictions and member numbers.¹¹¹

Status remains unclear

It is difficult to reconcile the rulings made in these cases into a coherent legal position on the current status of traditional councils in North West. Nor do the cases shed light on the legal consequences of North West's recent reconstitution attempts. The totality of legislative intervention, case law and government action related to traditional councils in North West only exacerbates the confusion and uncertainty about how these councils should be dealt with in policy and practice.

Despite previously acknowledging traditional councils' questionable status, North West continues in its attempts to establish and recognise lawfully

reconstituted councils in the province. An April 2011 circular by the North West Department of Local Government and Traditional Affairs warned chairpersons of traditional councils not to enter into contracts until the councils were 'duly reconstituted'.¹¹² The circular notes that the term of office of traditional council members ended on 24 September 2010 'by operation of law' and goes on to say:

The danger about contracts/deals concluded post 24 September 2010 is that they might be of no force and affect, therefore invalid. The basis therefor [sic] being that such traditional councils lacked legal standing at the time the said contracts/deals were concluded.¹¹³

Since traditional council elections were a failure in 2011, there could have been no subsequent change in uncertainty about councils' legal standing – at least not until the most recent election process in 2014.

National government also seems aware of the problems with reconstituting traditional councils. In a draft Traditional Affairs Bill, intended to repeal the TLGFA and published for comment in September 2013 by the national Department of Cooperative Governance and Traditional Affairs, a transitional provision is proposed that jumps back in time to deem the tribal authorities that existed at the time of the TLGFA's commencement as new traditional councils.¹¹⁴ It furthermore requires them to be reconstituted by a specific deadline according to the same requirements currently in the TLGFA – effectively starting the transformation process afresh.¹¹⁵ If the deadline is not met, the Minister of Cooperative Governance and Traditional Affairs 'may take the necessary steps to ensure' compliance with the reconstitution requirements.¹¹⁶ This would, to an extent, clarify what the weak consequences are for untransformed traditional councils, but also potentially raises a number of practical problems regarding the new starting point and deadline for reconstitution. If this provision is enacted as is by Parliament, confusion relating to the legal status and composition of traditional councils is unlikely to be resolved.

Uncertainty arising from tensions in the legislation

It is submitted that uncertainty about the status of traditional councils in North West has arisen in part as a cumulative result of several underlying tensions in the legislation. While these tensions serve to explain conceptual reasons for the murky status of traditional councils, they fail to explain fully the practical reasons for non-compliance with the reconstitution requirements in the legislation. This requires further research beyond the scope of this article.

The first tension exists between s28(4) and s3 of the TLGFA. A process that aims to replace old authorities because of their tainted origins becomes inherently self-contradictory when the old authorities are retained as a starting point to establish new authorities. While s28(4) puts measures in place to ensure the transformation of these old authorities, the nature of the transition necessarily leaves an old authority intact for a period of time and therefore to an extent validates its existence. When a particular institutional foundation is maintained, and, moreover, is historically entrenched, there is also a danger that it becomes a default reference point – particularly when attempts at transformation have repeatedly failed, as is the case in North West. The interaction between new requirements for constitution in terms of s3 and a validation of the status quo in s28(4) furthermore creates confusion about how the two provisions are to be applied together in practice, or when s3 is to be applied in isolation. This confusion manifests similarly for ss6 and 43 of the NWA, as was apparent when the North West government cited s6(3) of the NWA – concerning traditional councils constituted for *newly* established traditional communities – as the basis for reconstituting old tribal authorities that had been deemed traditional councils.¹¹⁷

There is a similar underlying tension between the rationale for s 28(4) of the TLGFA and its actual effect. The provision aimed to revive pre-colonial customary practices of traditional leaders making decisions in council, while simultaneously trying to introduce post-colonial and post-apartheid notions of democracy and equality.¹¹⁸ The provision thus aimed for traditional authorities to progress forward while gazing far backward, but then rejected both

motivations altogether when choosing a basis for new traditional councils. Instead, the authorities that existed precisely as a result of colonialism and apartheid were favoured as starting points.¹¹⁹

Secondly, much of the uncertainty that has shrouded traditional councils in North West can be attributed to the tension that was created when the TLGFA's provisions were translated into the NWA. There is a likely delay between the commencement of national framework legislation and provincial legislation based on that framework.¹²⁰ Thus, while the TLGFA commenced in 2004, the NWA was created in 2005 and commenced only much later, in 2007. This delay automatically undermines the ability of provincial governments to perform tasks set out in framework legislation for completion according to provincial legislation, but within a stipulated time period – particularly when that period is as short as one year.

As mentioned earlier, the TLGFA's transitional and reconstitution provisions concerning traditional councils were not adopted with the same wording by North West. As pointed out by one North West judge,¹²¹ the different formulation of these provisions is not purely grammatical – it fundamentally changes the legal meaning of the provisions and potentially results in a conflict between the two Acts.¹²² The NWA furthermore omitted important features of the national Act.¹²³ These omissions meant that North West government officials had to rely indirectly on the TLGFA, or on technically irrelevant provisions in the NWA, as legal authority when issuing provincial notices concerning traditional councils. The absence of a North West provision for traditional council elections has also meant that regulations to authorise and practically guide election procedures are lacking. The legal position and procedure concerning the reconstitution of traditional councils in North West has, as a result, been marred with ambiguity.

Notwithstanding the confusion created by these tensions, North West's application of the legislative provisions has been remarkably slack. Prompt and attentive compliance with the reconstitution requirements could have prevented at least some of the existing uncertainty. If North West possesses the political will to lawfully reconstitute traditional councils – as suggested in its press releases – this has not

translated into effective action. Indeed, the provincial government's conduct has only served to amplify the questionability of traditional councils' status in the province.

Broader impact of uncertainty around status

The disarray regarding traditional council reconstitution in North West exists within a broader everyday political context, and acts in conjunction with other policy initiatives by the government. Rhetoric surrounding the traditional leadership legislation, along with *de facto* election processes (no matter how flawed in reality), have created the impression that traditional councils are democratic governance structures representative of traditional communities.¹²⁴ As a result, traditional councils have been included in several policy proposals, and in practice participate in important decision-making processes.

Policy proposals suggest the government's intention to entrust traditional councils with increasing governmental responsibility. In a September 2012 'submission' on the (presently lapsed) Traditional Courts Bill, the national Department of Justice and Constitutional Development proposed that traditional councils are also constituted as traditional courts for the purposes of dispute resolution.¹²⁵ An August 2013 Communal Land Tenure Policy by the national Department of Rural Development and Land Reform similarly proposed that ownership of communal land be transferred from the state to traditional councils.¹²⁶ In terms of these policies, traditional councils would not merely represent traditional communities; they would also be adjudicators and landowners.

Moreover, the government is channelling *ad hoc* funding and resources to traditional councils,¹²⁷ including salaries for staff at traditional council offices. This is questionable, given the dubious legal status of these structures where they have not been properly reconstituted. In 2010, North West published details of a revenue allocation to municipalities in the province, including funding to subsidise the 'salaries of traditional community staff' in order to provide 'support to traditional councils'.¹²⁸ A lack of effective accounting systems within traditional councils was acknowledged as the reason for not transferring

funds directly to them on an annual basis.¹²⁹ Yet this has not deterred the government from interactions with traditional councils, or from proposing greater responsibility for these councils in policy.

North West's 2011 circular, warning traditional councils not to enter into transactions because of their dubious status, reveals that the councils are in practice entering into agreements on behalf of traditional communities. These transactions could be quite substantial – taking the form of multi-million rand deals with mining companies, for example.¹³⁰ Uncertainty concerning traditional councils' legal status could thus contribute to obfuscation around community representation or consultation, and diminish accountability by mining companies in the platinum belt.¹³¹

Traditional councils' questionable status could also have a negative impact on access to justice for harmful, criminal or unaccountable conduct by traditional and other governance structures. People in traditional communities in North West, such as the Bapo-ba-Mogale, have struggled against corrupt and unaccountable leadership in a context where mining companies continuously strive to gain larger profits from the platinum-rich land on which they live.¹³² When the status of traditional councils becomes a site for contestation, the danger is that material issues will be lost in technical arguments *in limine* about legal standing – or, that the broader context will be overlooked in favour of narrow legal questions. This seems to have happened in the cases discussed above. What should be a challenge about fraud, corruption, mismanagement of funds and maladministration, committed to the detriment of ordinary people, becomes all about the status and position of a small elite.¹³³

A compelling issue for further research is how the existing legislative schema, North West's conduct and diverging court opinions in respect of traditional councils have an impact on the rule of law, which is a fundamental constitutional value in South Africa.¹³⁴ Not only has legal certainty around traditional councils' status been compromised; North West's disregard for correct compliance with the reconstitution requirements undermines the principle of legality and calls into question whether North

West actually recognises the binding authority of the traditional leadership legislation.¹³⁵ The relationship between national and provincial government is also unsettled: if provinces no longer comply with relevant national law and policy, what does that mean for cooperative governance in the country, as enshrined in chapter 3 of the Constitution? Further, if non-compliance extends beyond the North West province, does legitimacy not demand revision of the legislative schema as a whole?¹³⁶

Conclusion

The need for clarity on the legal status and membership of traditional councils in North West is accentuated when considering the possible legal, political and social impacts of terminating their legal authority. Who would then be responsible for traditional governance and how would they be held democratically accountable? The North West government would furthermore have to determine the appropriate legal method of dealing with prior decisions and transactions by traditional councils that have been declared unlawful.

Meanwhile, traditional councils continue to exist, function and receive local recognition in practice, despite their uncertain legal footing; and this may in fact not be problematic. There is legal support for the existence of customary authorities separate from, and parallel to, traditional institutions officially recognised by state legislation.¹³⁷ However, it is questionable whether traditional councils operating *de facto* in North West are actually customary in nature and origin. If they remain untransformed and do not enjoy statutory recognition, are they not still the same tribal authorities that were created under apartheid?¹³⁸

Acceptance of untransformed traditional councils may render futile the TLGFA's underlying transitional rationale and defy the Constitution's broader demand for democracy, equality and accountability.

These important considerations require that national and provincial government take seriously the difficulty and dissatisfaction that has been noted in respect of traditional council reconstitution in North West. If not, the legitimacy of these supposedly democratic institutions could be undermined.



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Notes

- 1 The author would like to thank Professor Hugh Corder, Dr Aninka Claassens and other senior staff at the Faculty of Law, University of Cape Town, for invaluable feedback on earlier drafts of this article, as well as the reviewers and editors of this publication, for their useful comments.
- 2 Tom Bennett and Christina Murray, Traditional leaders, in Stu Woolman et al (eds), *Constitutional law of South Africa*, 2nd ed (OS 12–05), Cape Town: Juta & Co., 2005, 26–21 and 26–65.
- 3 Preamble to the Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003, or TLGFA), Pretoria: Government Printer.
- 4 TLGFA, Section 28.
- 5 This statute was later renamed the Black Authorities Act 1951 (Act 68 of 1951, or BAA).
- 6 Later amendments to the BAA handed this power over to the State President of the Republic of South Africa.
- 7 BAA, Section 2(1).
- 8 BAA, Sections 2(2), 3(1) and (1)(a).
- 9 Department of Provincial and Local Government, The White Paper on Traditional Leadership and Governance, GG 25438 GN 2336, 10 September 2003, 1.2 and 2.
- 10 Section 28(4) thus states: 'A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.'
- 11 For a general discussion of this transitional provision, see Centre for Law and Society, Questioning the legal status of traditional councils in South Africa, fact sheet, August 2013, http://www.cls.uct.ac.za/user/download/CLS_TCStatus_Factsheet_Aug2013.pdf (accessed 17 July 2014).
- 12 Traditional Leadership and Governance Framework Amendment Act 2009 (Act 23 of 2009), Section 22(1)(a), Pretoria: Government Printer.
- 13 For a general discussion of North West's transitional provision, see Centre for Law and Society, Questioning the legal status of traditional councils.
- 14 For an account of the political, social and economic contestations existing in three traditional communities affected by mining in North West, see Andrew Manson, Mining and 'traditional communities' in South Africa's 'platinum belt': contestations over land, leadership and assets in North-West Province c. 1996–2012, *Journal of Southern African Studies* 39(2) (2013), 409–423. See also Aninka Claassens and Boitumelo Matlala, Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires, in Gilbert M Khadiagala et al (eds), *New South African review 4: a fragile democracy – twenty years on*, Johannesburg: Wits University Press, 2014.
- 15 TLGFA, Section 3(2)(c)(ii).
- 16 Ibid., Section 3(2)(c)(i).

- 17 Ibid.
- 18 Ibid., Section 3(2)(c)(i) and (ii).
- 19 Ibid., Section 3(2)(c)(i). The wording of this provision seems to suggest that the senior traditional leader may need to select more women to serve on the council than he or she ordinarily would have, depending on whether a sufficient number of women have already been elected to the council.
- 20 Section 6(2)(d) of the North West Traditional Leadership and Governance Act 2005 (Act 2 of 2005, or NWA), merely stipulates, as per the TLGFA, that the senior traditional leader of a traditional community will also be the chairperson of its traditional council.
- 21 This is implied in Section 6(1) of the NWA, which states that traditional communities must have traditional councils constituted in terms of the NWA 'as read with the Framework Act'.
- 22 North West has gone beyond the basic split to prescribe how the 60% portion of selected members should be divided further among royal family members, headmen and ordinary community members. See Premier: North West Provincial Government, Determination of the number of traditional councils in terms of section 6 of the North West Traditional Leadership and Governance Act, 2005, *Provincial Gazette* 6911 Notice No. 2, 12 July 2011; Acting MEC for Local Government and Traditional Affairs, Determination of the number of the members of traditional councils in terms of section 6(1) of the North West Traditional Leadership and Governance Act No. 2 of 2005, *Provincial Gazette* 7107 Notice No. 2, 30 April 2013.
- 23 Lisa Heeman, Confusion marks traditional council elections in North West, *Law, Custom & Rights* newsletter, August/September 2011, 5, http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf (accessed 17 July 2014).
- 24 Premier: North West Province, Reconstitution of traditional councils in accordance with the North West Traditional Leadership and Governance Act no. 2 of 2005, *Provincial Gazette Extraordinary* 6514 Notice No. 1, 15 July 2008. This notice was supplemented with another notice in 2009, after the first page of the Schedule to the 2008 notice was mistakenly omitted. See Erratum: Provincial Gazette No. 6514 of 15 July 2008, *Provincial Gazette Extraordinary* 6680 GN 258, 21 August 2009.
- 25 See Brendan Boyle's interview with Hugh Eiser in this publication.
- 26 The North West traditional council election process is also briefly discussed in Centre for Law and Society, Questioning the legal status of traditional councils.
- 27 Hugh Eiser, The North West Provincial Government, traditional communities and mining companies: the Bapo-ba-Mogale community, Lonmin, and the failings of the North West Provincial Government, paper presented at a seminar hosted by the Centre for Law and Society, University of Cape Town, 27 March 2014, 5. For more on traditional council elections in Bapo-ba-Mogale traditional community, see Brendan Boyle's interview with Hugh Eiser in this publication. The 'flawed' nature of these elections was corroborated in Heeman, Confusion marks traditional council elections in North West, 5.
- 28 North West Acting MEC: Local Government and Traditional Affairs, Notice of annulment of traditional council elections held on 28 September 2011, 2 November 2011 and 12 November 2011 and proclamation of date of reconstitution of traditional councils, *Provincial Gazette Extraordinary* 7107 Notice No. 3, 30 April 2013.
- 29 Ibid.
- 30 A press release reveals that the province was hoping that the Electoral Institute for Sustainable Democracy in Africa (EISA) would manage the 2011 elections. See North West Department of Local Government and Traditional Affairs, Plans in motion for election of new members of traditional councils, Press Release, 12 April 2011, <http://www.nwpg.gov.za/DDLG&TA/WhatsUp/Media%20Release/Tuesday12April.asp> (accessed 17 July 2014). However, it appears from EISA's website that it was not involved in the 2011 elections – see EISA, BES: Overview of activities 1996–2011, <http://www.content.eisa.org.za/old-page/bes-overview-activities-1996-2011> (accessed 17 July 2014).
- 31 Heeman, Confusion marks traditional council elections in North West, 5.
- 32 Ibid., 5–6.
- 33 Ibid., 6.
- 34 Ibid., 5.
- 35 Heidi Swart, Bapo-ba-Mogale community turns to public protector, *Mail & Guardian*, 14 September 2012, <http://mg.co.za/article/2012-09-13-bapo-community-turns-to-protector> (accessed 17 July 2014).
- 36 Ibid. This election took place in December 2009 after the resignation of previous traditional council members, but was never recognised by the North West provincial government – according to Eiser, The North West Provincial Government, traditional communities and mining companies, 6.
- 37 *Mogale v Maakane and Others* (1106/2010) [2010] ZANWHC 18 (29 July 2010), paras 96–7.
- 38 See also averments by the North West Premier in *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi and Another* (31876/10) [2010] ZAGPPHC 72 (29 July 2010), para 38.
- 39 See *Maakane and Others v Premier of the North West Province and Others* (2715/2010) [2011] ZANWHC 29 (23 June 2011), para 12.
- 40 Swart, Bapo-ba-Mogale community turns to public protector.
- 41 North West Department of Local Government and Traditional Affairs, Department signs MoU with IEC to reconstitute traditional councils, 26 April 2013, www.info.gov.za/speech/DynamicAction?pageid=461&sid=36041&tid=105531 (accessed 23 August 2013).
- 42 Ibid.
- 43 North West Department of Local Government and Traditional Affairs, It's all systems go for upcoming traditional council elections, Press Release, 29 April 2013, <http://www.gov.za/speeches/view.php?sid=36101> (accessed 17 July 2014). In this press release the election process was described in the language of democracy and reference was again made to elections as a means to restore stability in communities that were experiencing unrest.
- 44 North West Acting MEC, Notice of annulment of traditional council elections, 2013. Note that this date contradicted a press release issued by North West just the day before.

- 45 North West Acting MEC: Local Government and Traditional Affairs, Notice of correction of the Extraordinary Provincial Gazette No. 7107 published 30 April 2013, *Provincial Gazette Extraordinary* 7110 Notice No. 4, 9 May 2013.
- 46 North West Department of Local Government and Traditional Affairs, Communities get last chance to register as voters in the upcoming elections of traditional councils, 30 May 2013, <http://www.gov.za/speeches/view.php?sid=36968> (accessed 17 July 2014). An earlier call for registration had been made on 17 May 2013 – see North West Local Government and Human Settlements, Voter registration for elections of traditional councils starts this weekend, 17 May 2013, <http://www.gov.za/speeches/view.php?sid=36567> (accessed 17 July 2014).
- 47 North West Acting MEC: Local Government and Traditional Affairs, Notice calling for the election of traditional councils in the North West, *Provincial Gazette Extraordinary* 7117 Notice No. 5, 4 June 2013.
- 48 North West Department of Local Government and Traditional Affairs, Postponement of traditional council elections 2013, Press Release, 5 July 2013, <http://www.gov.za/speeches/view.php?sid=37794> (accessed 17 July 2014). This press release stated that ‘the climate ... is not conducive for credible elections’. See also North West traditional council elections postponed, *SABC*, 7 July 2013, <http://www.sabc.co.za/news/a/6c6f700040433080a675e754d9bad304/North-West-traditional-council-elections-postponed> (accessed 17 July 2014).
- 49 North West Department, Postponement of traditional council elections, 2013. Months later, North West reduced these reasons to ‘low voter registration’, stating that poor turnout at registration was the main reason for postponing the elections in July 2013. See North West Department of Local Government and Traditional Affairs, It’s all systems go for the traditional council elections, 12 November 2013, <http://www.gov.za/speeches/view.php?sid=41599> (accessed 17 July 2014).
- 50 North West Department, It’s all systems go for the traditional council elections. Dates for voter registration were announced in North West Provincial Government, North West Premier Thandi Modise urges rural communities to register for traditional council elections, 23 November 2013, <http://www.gov.za/speeches/view.php?sid=41992> (accessed 17 July 2014); while candidate nomination forms were requested in North West Local Government and Human Settlements, North West traditional communities urged to return candidates traditional council nomination forms, 29 November 2013, <http://www.gov.za/speeches/view.php?sid=42234> (accessed 17 July 2014).
- 51 North West Department, It’s all systems go for the traditional council elections. See also EISA, Overview of activities.
- 52 North West Department, It’s all systems go for the traditional council elections. This was reiterated in a press release issued on the day before traditional council elections eventually took place. See North West Department of Local Government and Traditional Affairs, MEC Tlhape urges communities to partake in traditional council elections, 24 January 2014, <http://www.gov.za/speeches/view.php?sid=43178> (accessed 17 July 2014).
- 53 North West MEC for Local Government and Traditional Affairs, Notice calling for the election of traditional councils in the North West, *Provincial Gazette Extraordinary* 7218 Notice No. 1, 22 January 2014. It should be noted that although only published three days before the elections, the notice had already been signed by the MEC on 14 January 2014, and had presumably also been communicated earlier to traditional communities in the province.
- 54 It seems that the impression was initially created (it is unclear how) within at least one traditional community that elections would take place on 18 January 2014. Instead, they took place a week later. See Eiser, The North West Provincial Government, traditional communities and mining companies, 8. In the words of a North West official: ‘It was not an easy exercise but ultimately we have [weathered] the storm’ – North West Local Government and Human Settlements, Department release results on traditional council elections, 25 March 2014, <http://www.gov.za/speeches/view.php?sid=44638> (accessed 17 July 2014).
- 55 Eiser, The North West Provincial Government, traditional communities and mining companies, 8. According to EISA, this was also the case in other traditional council areas – see Electoral Institute for Sustainable Democracy in Africa, Overview of activities. However, in late March 2014, the province announced that results would be released in traditional council areas only from that week onwards. Thereafter, senior traditional leaders would submit the names of selected members, and ‘proper’ traditional councils could then be gazetted. See North West Local Government and Human Settlements, Department release results on traditional council elections, 2014.
- 56 As at July 2014. As pointed out by Eiser, The North West Provincial Government, traditional communities and mining companies, 8, publication in the Gazette has not occurred despite this being a requirement in Section 6(3) of the NWA. According to Eiser, the official reason given for not having published the names was that some communities had not yet submitted the names of selected members to the government.
- 57 Peter Mashala, Councils: where is the democracy?, *Farmer’s Weekly*, 2 January 2014, <http://www.farmersweekly.co.za/article.aspx?id=51593&h=Councils:-where-is-the-democracy> (accessed 17 July 2014).
- 58 Ibid.
- 59 Aspects of these cases will be examined in more detail in later sections. See, for descriptions of events in the traditional community: *Mogale v Maakane*, para 50; *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, paras 53 and 61; Eiser, The North West Provincial Government, traditional communities and mining companies; Setumo Stone, Tribal landlord wants strike declared unlawful, *Business Day*, 10 June 2014, <http://www.bdlive.co.za/national/labour/2014/06/10/tribal-landlord-wants-strike-declared-unlawful> (accessed 17 July 2014); and Swart, Bapo-ba-Mogale community turns to public protector.
- 60 Mazibuko K Jara, Pending traditional council elections in KwaZulu-Natal and Limpopo, *Law, Custom & Rights* newsletter, August/September 2011, 7, http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf (accessed 17 July 2014).
- 61 As at July 2014. In April 2007, the Director-General of the then Department of Provincial and Local Government admitted that only KwaZulu-Natal, North West, Northern Cape and Gauteng could report having any reconstituted traditional councils in their provinces – see Gender

- composition of traditional leaders and traditional councils after the implementation of new legislation, Annexure LMN6 to Second Respondent's Answering Affidavit in *Tongoane and Others v National Minister of Agriculture and Land Affairs and Others* (Case no. 11678/06), Transvaal Provincial Provision, April 2007.
- 62 IFP leader goes to court to stop elections, *The Citizen*, 9 February 2012, <http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=257666&sn=Detail&pid=334&IFP-leader-goes-to-court-to-stop-elections> (accessed 13 February 2012); Sharika Regchand, Traditional elections to continue despite objection, *The Mercury*, 16 February 2012, http://www.iol.co.za/news/politics/traditional-elections-to-continue-despite-objection-1.1235508?utm_medium=email&utm_campaign=Blacks+had+no+claim+to+4%E2%80%A6#.U8ejpfmSz94 (accessed 17 July 2014).
- 63 Skhumbuzo Miya, Chaos at Sweetwaters poll: protesters block voting stations, *The Witness*, 20 February 2012, http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=76987 (accessed 2 March 2012). An earlier traditional council election process in KwaZulu-Natal seems to have been equally flawed in respect of voter turnout, with no voters' roll and uncontested elections in many areas where all candidates who had been nominated filled the elected member spots on traditional councils – see Jean Redpath, Past KwaZulu Natal traditional council elections flawed, *Law, Custom & Rights* newsletter, August/September 2011, 3–4, [http://www.cls.uct.ac.za/user/download/ LRG_News_AUG_SEPT2011.pdf](http://www.cls.uct.ac.za/user/download/LRG_News_AUG_SEPT2011.pdf) (accessed 17 July 2014).
- 64 TLGFA, Section 3(2)(b).
- 65 Preamble to the TLGFA. For an analysis of the extent to which the gender composition requirement can advance substantive gender equality, see Bennett and Murray, Traditional leaders, 26–22.
- 66 See NWA, Section 6(2)(c).
- 67 TLGFA, Section 3(2)(d). In order to make use of the procedure it would have to be proven to the Premier that 'an insufficient number of women are available to participate' in a particular traditional council.
- 68 See Gender composition of traditional leaders and traditional councils, 2007.
- 69 Ibid. The statistics further indicate that of the 29% women traditional council members in North West, about 82% of them had been elected by their traditional communities rather than selected by a senior traditional leader.
- 70 Premier, Reconstitution of traditional councils, 2008; Erratum, 2009. According to Judge Landman in *Mogale v Maakane*, para 102, if traditional councils as gazetted fail to meet the gender threshold, then the 'Premier's notice offends against the principle of legality' because it contradicts what is required by law.
- 71 TLGFA, Section 3(2)(a), as amended.
- 72 Ibid.
- 73 Ibid., Section 3(2)(a), prior to amendment. See amendment to this provision at Section 4 of the Traditional Leadership and Governance Framework Amendment Act 2009.
- 74 See NWA, Section 6(2)(b).
- 75 The NWA combined this 30-member limit with the requirement that the North West Premier determine how many members there should be per traditional council using a formula based on the traditional community's population size – even before the TLGFA was similarly amended in 2009. See NWA, Section 6 (2)(a).
- 76 Section 146(2)(b) of the Constitution of the Republic of South Africa, 1996, indicates that where there is a conflict between national and provincial legislation dealing with traditional leadership (a Schedule 4 functional area), the national legislation will prevail if it is trying to establish a framework for uniform regulation of an issue. On this, see Landman, *Mogale v Maakane*, paras 63–6, as well as Bennett and Murray, Traditional leaders, 26–31, who offer a different view.
- 77 Department of Traditional Affairs, Traditional Leadership and Governance Framework Act, 2003: Guidelines for determination of number of members of traditional councils, GG 34242 GN 354, 21 April 2011.
- 78 Premier, Determination of the number of traditional councils, 2011; North West Acting MEC, Determination of the number of the members of traditional councils, 2013.
- 79 Eiser, The North West Provincial Government, traditional communities and mining companies, 5.
- 80 Premier: North West Province, North West Traditional Leadership and Governance Act (2/2005): Commencement, *Provincial Gazette Extraordinary* 6390 Notice No. 1, 4 April 2007.
- 81 NWA, Section 43(3)(a).
- 82 In *Mogale v Maakane*, para 102, Landman states that the lateness of this notice (not only the publication thereof, but also the Premier's signing thereof) means that the Premier was acting without legal authority when attempting to disestablish the tribal authorities. Furthermore, the retrospective amendment of the TLGFA does not validate this unlawful action by the Premier (para 109). However, the Premier's notice was never set aside in Landman's ruling (see para 112).
- 83 Section 43(3)(b) of the NWA goes on to require that a notice disestablishing tribal authorities must also regulate how their staff and financial assets will be transferred and managed after the disestablishment. See also Eiser, The North West Provincial Government, traditional communities and mining companies, 2.
- 84 In *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, para 45, Judge Legodi held that the invalidity of the late 2008 reconstitution notice could not be remedied by the retrospective amendment of Section 28(4) of the TLGFA. Legodi notes in the same paragraph that the notice was an 'exercise in futility'.
- 85 See, for example, *Maakane v Premier of the North West Province*, paras 14–20 and Eiser, The North West Provincial Government, traditional communities and mining companies.
- 86 This is the argument of legal counsel for Bapo-ba-Mogale. See Eiser, The North West Provincial Government, traditional communities and mining companies, 8. See also Manson, Mining and 'traditional communities' in South Africa's 'platinum belt', 423.
- 87 See Bennett and Murray, Traditional leaders, 26–22 to 26–23, who note that possible consequences for failing to reconstitute could be the withdrawal of traditional community status, loss of governmental support or exclusion from service delivery agreements with municipalities, but that none of these is mentioned explicitly in the TLGFA.

- 88 This is one of at least two possible interpretations of the transitional provision identified in Centre for Law and Society, Questioning the legal status of traditional councils.
- 89 In terms of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004), there may be an argument for the continued existence of traditional councils despite non-compliance with the reconstitution requirements until they have been declared invalid by a court. In other words, if the result of non-compliance is invalidity, this does not automatically take effect. Where persons belonging to a traditional community are contesting the status of that community's traditional council as a failed governance institution, this may place an unreasonable burden on ordinary people living in the former homelands to make an application for invalidity at court.
- 90 In respect of the disestablishment of regional authorities, for example, the TLGFA stipulates how the practical and financial consequences of doing away with the authority should be dealt with – see Section 28(6).
- 91 Section 2(2) of the NWA specifies that the NWA is 'subject to' the TLGFA.
- 92 Section 43(1) of the NWA, which states that: 'All tribal authorities established in terms of Act 23 of 1978 [the Bophuthatswana Traditional Authorities Act] shall continue until such time that it is substituted by the newly reconstituted traditional councils ...'.
- 93 This was an argument of Bapo-ba-Mogale traditional authority members in litigation considering the legal status of the authority – see *Mogale v Maakane*, para 32. The argument was upheld by Legodi – see *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, para 41.
- 94 NWA, Section 43(3).
- 95 Bennett and Murray, Traditional leaders, 26–31, suggests to the contrary that provincial traditional leadership Acts may be able to develop procedures for dealing with traditional leaders that differ from the TLGFA on the basis that if the TLGFA is framework legislation, it can only prevail over provincial legislation insofar as it sets framing guidelines.
- 96 Summaries of these judgements are included in Centre for Law and Society, Questioning the legal status of traditional councils.
- 97 *Mogale v Maakane*, para 8. This 'uncertainty' was in part due to the failure of an acting judge to make a ruling on similar questions that had been presented to the Court almost two years prior – see para 19.
- 98 Ibid., paras 41, 81, 89, 108 and 112.
- 99 Ibid., para 83.
- 100 Ibid., para 112.
- 101 Ibid., paras 84 and 93.
- 102 Ibid., para 92.
- 103 Ibid., paras 108 and 112.
- 104 For an account of the background to these two judgements, see Manson, Mining and 'traditional communities' in South Africa's 'platinum belt', 420; Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 132–3.
- 105 *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, paras 39.3 and 44.
- 106 Ibid., paras 40–41 and 63. It should be noted that this approach seems to use as its starting point the NWA's provisions, rather than the TLGFA's provisions to which it is subject, and then ignores the one-year deadline placed on the disestablishment of old tribal authorities contained within the NWA itself.
- 107 *Maakane v Premier of the North West Province*, para 1.
- 108 Ibid., paras 12, 18 and 22.
- 109 Ibid., para 22.
- 110 *Pilane and Another v Pheto and Others* (582/2011) [2011] ZANWHC 63 (30 September 2011), paras 14, 18 and 19. Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 128 and 131–2, explain the broader political implications of these contradictory judgements.
- 111 *Pilane v Pheto*, paras 16 and 18. It is stated in para 18 of the judgement that '[t]here can never be a lacuna in that no Traditional Council exists to run the affairs of the traditional community'.
- 112 North West Directorate: Traditional Affairs, Contracts/deals concluded post 24 September 2010: Traditional Councils, Circular Minute 03/2011 (11 April 2011), on file with the author. See also Centre for Law and Society, Questioning the legal status of traditional councils; Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 132.
- 113 North West Directorate, Contracts/deals concluded post 24 September 2010.
- 114 Department of Traditional Affairs, Invitation to comment on the Traditional Affairs Bill, 2013, GG 36856 GN 947, 20 September 2013, at clause 69(4).
- 115 Ibid.
- 116 Ibid.
- 117 Premier, Reconstitution of traditional councils, 2008.
- 118 Department of Provincial and Local Government, The White Paper on Traditional Leadership and Governance, 4.1.
- 119 It should be noted that this tension, as well as that existing between Sections 3 and 28(4), is not alleviated by the new version of the transitional provision proposed in the draft Traditional Affairs Bill.
- 120 This is because provincial legislatures have to undertake their own law-making processes, including public participation processes, pursuant to the framework legislation once it has been promulgated.
- 121 Judge Landman in *Mogale v Maakane*, paras 92–3. See also Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 128.
- 122 There is a further potential conflict between the two transitional provisions *within* the NWA – one of which extends the life of tribal authorities indefinitely (Section 43(1)), while the other requires them to be extinguished within one year of the Act's commencement (Section 43(3)).
- 123 As discussed earlier, these omissions include the split between elected and selected membership for traditional councils and the possibility of female membership that is less than one-third at the discretion of the Premier.
- 124 Redpath, Past KwaZulu Natal traditional council elections flawed, 4. See also Centre for Law and Society, Questioning the legal status of traditional councils.

- 125 A submission of the Department of Justice and Constitutional Development to the Select Committee on Security and Constitutional Development on the Traditional Courts Bill, 12 September 2012, <http://db3sqepoi5n3s.cloudfront.net/files/docs/120912scsecuritydevelopment.pdf> (accessed 17 July 2014).
- 126 Centre for Law and Society, Communal Land Tenure Policy (CLTP), fact sheet, September 2013, http://www.cls.uct.ac.za/usr/lrg/downloads/CLS_CommunalLand_Factsheet_Sept2013.pdf (accessed 5 May 2014). It has already been reported in the media that restitution land worth R60 million was transferred to a traditional council in North West by the Premier – see Sapa, Modise returns R60m worth of ‘stolen’ land, *Mail & Guardian*, 26 August 2013, <http://mg.co.za/article/2013-08-26-modise-hands-over-r60m-worth-of-land-to-traditional-council> (accessed 17 July 2014). It was similarly proposed that traditional councils be land administration committees in the Communal Land Rights Act 2004 (Act 11 of 2004), which was subsequently declared unconstitutional – see Redpath, Past KwaZulu Natal traditional council elections flawed, 4.
- 127 See, for example, the handing over of 19 vehicles to traditional leaders and councils in North West – North West Local Government and Human Settlements, Government delivers on its commitment of improving the functioning of traditional councils, 9 May 2014, <http://www.gov.za/speeches/view.php?sid=45486> (accessed 17 July 2014).
- 128 Allocations to municipalities in the North West Province in terms of section 29 of the Division of Revenue Act 2010, Act 1 of 2010, *Provincial Gazette Extraordinary* 6784 Notice No. 163, 26 May 2010. This particular allocation was made by the North West Department of Local Government and Traditional Affairs.
- 129 Ibid.
- 130 Evidence of the magnitude of deals that mining companies are willing to make with traditional communities, through their representatives, can be seen in: Eiser, The North West Provincial Government, traditional communities and mining companies. On this point, Manson, Mining and ‘traditional communities’ in South Africa’s ‘platinum belt’, 422, notes that ‘sharing the benefits of mining with local communities through their “Traditional Authorities”, through royalties, shares or employment, is at best precarious and at worst disastrous’.
- 131 As evidenced by the experiences of Bapo-ba-Mogale – see Eiser, The North West Provincial Government, traditional communities and mining companies. Manson, Mining and ‘traditional communities’ in South Africa’s ‘platinum belt’, 417–19, describes the difficulty that mining companies had in trying to identify ‘legitimate’ leadership to act as representatives of the Bakwena ba Mogopa traditional community in mining deals. This difficulty arises because actors, as Bennett and Murray, Traditional leaders, 26–66 point out, ‘assume that consultation with traditional leaders is equivalent to consultation with the communities themselves’.
- 132 See Boitumelo Matlala ‘We want the bread, not the crumbs’, Engaging traditional authority and the state: the case of Bakgatla ba Kgafela, and Sonwabile Mrwana, The chief’s justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela traditional authority area, North West Province – both in this publication. See also Manson, Mining and ‘traditional communities’ in South Africa’s ‘platinum belt’.
- 133 It is pointed out by Christian Lund and Catherine Boone, Introduction: land politics in Africa – constituting authority over territory, property and persons, *Africa* 83(1) (2013), 1 – 13, 2 that ‘[o]ften, processes of recognition become focal points of contestation among groups in society’. Further, that contestation is linked to resistance against monopolies of power and resources.
- 134 The ‘rule of law’ is included as a founding value at Section 1(c) of the Constitution.
- 135 On this issue, see Landman’s comments on the North West Premier’s conduct in *Mogale v Maakane*, para 102. For more on the principle of legality and the rule of law generally, see François du Bois (ed), *Wille’s principles of South African law*, 9th ed, Cape Town: Juta & Co., 2007, 18–19; Iain Currie and Johan de Waal, *The Bill of Rights handbook*, 5th ed, Cape Town: Juta & Co., 2006, 10–13.
- 136 In 2005 Bennett and Murray, Traditional leaders, 26–65 to 26–66, warned that instead of allowing for ‘gradual democratisation’ of customary practice, the TLGFA introduced a rigid framework with little incentive to transform for traditional leaders and councils.
- 137 *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013), para 44.
- 138 More specifically for the North West, are they not then merely the tribal authorities that existed in terms of Section 3 of the Bophuthatswana Traditional Authorities Act 1978 (Act 23 of 1978)?